

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS KEPPLER,)
)
Claimant,)
)
v.)
)
MATHESON FLIGHT EXTENDERS, INC.,)
)
Employer,)
)
and)
)
XL SPECIALTY INSURANCE COMPANY,)
)
Surety,)
Defendants.)
_____)

IC 2004-013592

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

June 13, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Coeur d'Alene, Idaho, on February 27, 2008. Harold B. Smith of Coeur d'Alene represented Claimant. W. Scott Wigle of Boise represented Defendants. Larry E. Lockhart, risk manager, attended the hearing on behalf of Employer. The parties submitted oral and documentary evidence and submitted post-hearing briefs. The matter came under advisement on June 3, 2008, and is now ready for decision.

ISSUES

Pursuant to the Amended Notice of Hearing dated February 14, 2008, the issues to be resolved at hearing were:

1. Whether and to what extent Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432;

RECOMMENDATION - 1

2. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits;

3. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits;

4. Whether and to what extent Claimant is entitled to retraining benefits pursuant to Idaho Code § 72-450;

5. Whether and to what extent Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) benefits, including whether Claimant is entitled to permanent total disability benefits pursuant to the odd-lot doctrine¹;

6. Whether apportionment for a pre-existing condition pursuant to Idaho Code 72-406 is appropriate; and

7. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

At the outset of the hearing, Claimant withdrew the issue of attorney fees. Claimant subsequently raised, in his post-hearing opening brief, the issue of whether he has reached medical stability. Such issue was not timely raised. In his post-hearing reply brief, Claimant confirmed that he is pursuing retraining benefits and is not seeking lifetime disability benefits.

Issues regarding medical benefits and temporary disability benefits were timely raised and referenced in the parties' post-hearing briefs. However, evidence and argument presented fail to establish that a dispute exists regarding these two issues. Defendants have paid all past medical benefits and temporary disability benefits sought by Claimant. There are no pending disputes regarding the need for future medical treatment. The retraining issue subsumes

¹ In the Amended Notice of Hearing dated February 14, 2008, Claimant's status as an odd-lot worker was identified as a stand alone issue, but was combined with PPD/PTD and rephrased as a single issue by the Referee at hearing, without objection by the parties.

potential recovery of temporary disability benefits during periods of retraining and no other dispute exists regarding temporary disability benefits.

Accordingly, the only remaining issues in dispute that were timely raised and not waived by the parties are:

1. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits;
2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits;
3. Whether and to what extent Claimant is entitled to retraining benefits pursuant to Idaho Code § 72-450; and
4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to his cervical spine on November 30, 2004, while working as a truck driver for Employer. It is further undisputed that Claimant sustained a previous industrial injury to his cervical spine in 1999 while working for a previous employer in California. Claimant underwent cervical surgery on September 1, 1999, as a result of his prior injury.

Claimant seeks retraining benefits. He would like to pursue a course of study in aviation maintenance technology offered by Spokane Community College and estimates that tuition will cost \$15,000, for a two year program. Claimant is concerned that he is at risk for further injury to his cervical spine if he continues to work as a truck driver. Multiple doctors have

recommended that he retrain and/or find employment that is less physically demanding than truck driving.

Defendants contend that Claimant's injury of November 30, 2004, did not result in permanent impairment. Claimant's physical impairment and limitations are the result of his previous injury of 1999. Claimant has failed to establish that he is entitled to either permanent disability benefits or retraining benefits. There cannot be a finding of permanent disability in the absence of permanent impairment. Claimant successfully returned to his pre-injury job for an alternate employer in November 2005 and is earning more money than he did at the time of injury.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant at hearing;
2. Claimant's Exhibits 1 through 18; and
3. Defendants' Exhibits 1 through 13.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born on February 5, 1953, and was 55 at the time of hearing. He graduated from high school and earned a certification from truck driving school. He obtained a CDL in 1980. Claimant was previously enlisted in the infantry division of the army. He has previous experience with woodworking as well as brief employment in a corn-dog factory. He is also an accomplished artist who specializes in depictions of World War I aircraft.

2. Claimant's previous injury of 1999 occurred when he was working as a truck driver for Logex in California. Claimant was attempting to separate a trailer from a tractor with a fifth wheel handle that would not release. He experienced pain to his cervical area and right upper extremity as the result of forceful pulling.

3. Diagnostic studies performed following the 1999 injury revealed that Claimant's spine was congenitally fused at C4-5. Claimant was diagnosed with herniated discs at C5-6 and C6-7 as a result of the 1999 injury. On September 1, 1999, Pasquale Montesano, M.D., performed an anterior cervical discectomy, fusion, and plating at C5-6 and C6-7. As a result of Claimant's congenital condition and his surgery, his cervical spine is fused from C4-7.

4. Claimant reached medical stability for his 1999 injury in June 2000. He received vocational rehabilitation to facilitate his work as an artist. Claimant was restricted by Dr. Montesano from heavy work. Claimant's fusion was, for the most part, successful. However, Claimant experienced subsequent sleep disturbance and occasional difficulty swallowing.

5. A follow up cervical MRI of May 31, 2001, revealed a small disc bulge at C3-4, for which Dr. Montesano felt no treatment was warranted. However, Dr. Montesano opined that Claimant would eventually need another fusion at the level adjacent to the surgical site and that such surgery would be related to the 1999 injury.

6. Dr. Montesano felt that Claimant was 80% improved from his pre-surgery condition by July 2001, and released Claimant to return to work as a truck driving instructor. Claimant worked as a truck driving instructor in 2001 for approximately six months, but was laid off. Claimant was re-hired for an additional six months and then laid off for the second time. Claimant's work as an instructor did not involve loading or heavy lifting.

7. Claimant went to work for Employer as a truck driver in late 2002. Employer contracts with the U.S. Postal Service to transport mail in semi-tractor/trailer rigs. Claimant was initially hired to help with the Christmas season, but was hired on a full-time basis after Christmas of 2002. Claimant's job duties included loading and unloading of mail from the trailers which required him to push heavy carts. Claimant did not receive a medical release to return to heavy work prior to or during his employment with Employer, but was able to perform his duties without accommodation.

8. Claimant's injury of November 30, 2004, occurred at the loading dock of the post office in Sagle, Idaho. Claimant's regular route did not include Sagle and Claimant had not previously delivered mail to the Sagle Post Office, but did so on the date of injury because he was filling in for another employee. Claimant was walking on the loading dock toward the trailer to retrieve mail when he struck his head on a low beam. Claimant experienced neck pain and upper extremity symptoms similar to those he felt following his 1999 injury.

9. Claimant sought medical care on the day of injury at an urgent care clinic in Sandpoint. Claimant was evaluated by Robert Rust, M.D., who diagnosed a "cervical strain and disc disease on top of old cervical disc issues." X-rays revealed a solid fusion without evidence of recent fracture. Dr. Rust documented that Claimant had a contusion on his forehead. Claimant was taken off of work, given a prescription for pain medications, and referred to physical therapy.

10. Claimant sought follow up care with Kirk Hjeltness, M.D., in Coeur d'Alene and was referred to neurosurgeon William Ganz, M.D., in Spokane due to ongoing complaints. Dr. Ganz made note of Claimant's previous cervical surgery and ordered diagnostic studies.

11. A cervical MRI of December 22, 2004, revealed a disc bulge at C3-4. Dr. Hjeltness referred Claimant to another neurosurgeon, Bret Dirks, M.D., to determine if the C3-4 disc bulge could be causing Claimant's symptoms. Dr. Dirks reviewed the diagnostic films and concluded that the disc bulge at C3-4 was not the cause of Claimant's pain. The medical evidence does not establish that the disc bulge at C3-4 identified in the December 2004 MRI was significantly different than reflected in Claimant's previous cervical MRI of May 2001.

12. An EMG was performed by James Lea, M.D., and reviewed by Dr. Ganz. The EMG demonstrated old radicular changes at C5 and C6, but did not reveal an acute injury or new nerve root impingement. Dr. Ganz concluded that Claimant did not have significant nerve root impingement and was not a surgical candidate. He referred Claimant to additional physical therapy.

13. Dr. Ganz indicated that Claimant's soft tissue injury of November 20, 2004 would be fixed and stable by March 2005 and that Claimant would not have contraindications for returning to his pre-injury job. However, Dr. Ganz noted that pushing mail carts and driving aggravated Claimant's neck and that he was prone to re-injury of his cervical spine while performing those job duties.

14. Warren Adams, M.D., is an orthopedic surgeon who evaluated Claimant at the request of Defendants on April 21, 2005. He agreed that Claimant was not a surgical candidate. Dr. Adams determined that Claimant had reached maximum medical improvement with regard to his injury of November 30, 2004, and that Claimant did not have either new permanent impairment or new work restrictions as a result of the injury.

15. Dr. Ganz reviewed the report of Dr. Adams and concurred with his findings.

16. J. Craig Stevens, M.D., is a physical medicine and rehabilitation specialist who evaluated Claimant at the request of his attorney on January 29, 2008. Dr. Stevens concluded that the injury of November 30, 2004, exacerbated Claimant's pre-existing cervical degenerative disc disease and cervical radiculopathy. However, it appears that Dr. Stevens felt that the exacerbation was temporary since he determined that Claimant did not need additional medical treatment as a result of the injury of November 30, 2004; did not have additional permanent impairment attributable to the injury of November 30, 2004; and did not have additional work limitations attributable to the injury of November 30, 2004.

17. Dr. Stevens indicated that Claimant's pre-existing PPI was 14% of the whole person and that the November 2004 injury did not increase Claimant's PPI. Similarly, Dr. Stevens felt that Claimant had permanent work restrictions (40 pounds maximum lifting to shoulder height and 20 pounds maximum lifting above shoulder height) that were due to Claimant's prior cervical fusion and degenerative disc disease. He felt that Claimant could return to truck driving if he abided by the lifting restrictions.

18. Claimant attempted to return to work for Employer in a modified duty capacity but the availability of light duty work was limited and ended in February 2005.

19. In the fall of 2005, Claimant accepted a job with Lange Trucking (Lange). Lange is a competitor of Employer and is also a contractor to the U.S. Postal Service. Lange took over the mail route that Claimant previously drove for Employer. Claimant is performing the same work for Lange that he performed for Employer, with slight variations in the route and turn around point for the route.

20. Claimant earned approximately \$16 per hour at the time of injury and was earning \$18.75 per hour at the time of hearing.

21. Claimant reported continuing cervical symptoms while performing his work for Lange, but does not require accommodation to perform his regular job duties. Claimant was not receiving medical treatment or taking on-going medication at the time of hearing.

DISCUSSION AND FURTHER FINDINGS

22. Permanent physical impairment is a necessary component of permanent disability, and in the absence of permanent impairment arising from an industrial injury, there can be no disability award. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989). The existence of permanent disability and a loss of earning capacity must be established in order for a claimant to be entitled to an award of retraining benefits pursuant to Idaho Code § 72-450. Accordingly, the existence of PPI is a threshold requirement to a finding of PPD and the existence of PPD is a threshold requirement to establish entitlement to retraining benefits.

23. The burden of proof to establish entitlement to workers' compensation benefits rests on the claimant who must establish, by a preponderance of evidence, all of the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934, 940 (1993).

24. PPI is defined as any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate

evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

25. Dr. Adams determined that Claimant did not have PPI as a result of the November 2004 injury and Dr. Ganz concurred with his opinion.

26. Dr. Stevens determined that the November 2004 injury prompted a “recurrence of pain” and “exacerbation of [Claimant’s] pre-existing condition of cervical degenerative disk disease and prior cervical fusion.” Dr. Stevens specifically indicated that Claimant’s PPI did not increase as a result of the November 2004 injury. Dr. Stevens found Claimant’s neurological exam to be normal. When read in its totality, Dr. Stevens’ report reflects that the November 2004 injury caused a transient increase in Claimant’s symptoms and not a permanent aggravation of his previous fusion.

27. The conclusions reached by Dr. Adams, Dr. Ganz, and Dr. Stevens regarding Claimant’s PPI are the same. To the extent that Dr. Stevens’ opinion may be subject to multiple interpretations, the opinions of Drs. Adams and Ganz are adopted over those of Dr. Stevens. Dr. Ganz’ opinion is afforded the most weight since he served as the treating physician, ordered diagnostic studies, made appropriate referrals, and evaluated Claimant on multiple occasions.

28. No medical service provider has recommended additional treatment or assigned ongoing physical limitations attributable to the 2004 injury. Rather, all physicians note impairment and restrictions that pre-date the 2004 injury.

29. Claimant was a credible witness and excellent historian. The Referee agrees that it is likely in Claimant’s best interest to retrain or at least have a back-up plan in the event he becomes physically unable to continue with his current employment. Aviation maintenance technology appears to be a field in which Claimant could apply his skills and talents. Claimant

faces an understandable dilemma, in that it will be a financial hardship for him to attend school, either in addition to or instead of continuing to work as a truck driver.

30. However, Claimant has not met his burden of proof to establish that he has PPI as a result of his injury of November 30, 2004. Drs. Ganz, Adams, and Stevens agree that Claimant does not have permanent impairment as a result of the November 2004 injury, and that Claimant has essentially been returned to his pre-injury condition. Claimant's permanent impairment, restrictions, and propensity for reinjury relate back to his injury of 1999.

31. Since Claimant does not have PPI attributable to the November 2004 injury, he cannot have PPD, as a matter of law. In the absence of PPD, Claimant is not a candidate for retraining benefits pursuant to Idaho Code § 72-450.

32. In spite of his restrictions, Claimant has been able to perform the essential job functions of a truck driver involved in the transport of bulk mail, albeit with the risk of re-injury. Claimant worked in this manner both prior to and following his injury of November 30, 2004.

33. Claimant has demonstrated the ability to return to his pre-injury employment with an alternate employer for increased wages for approximately two years. It would not be appropriate to find Defendants liable for the costs of Claimant's retraining when there is not a loss of earning capacity to be restored and when Claimant's permanent impairment pre-dates the injury for which Defendants are responsible.

34. Since Claimant is not entitled to additional income benefits or retraining benefits, the issue of apportionment pursuant to Idaho Code § 72-406 is moot.

CONCLUSIONS OF LAW

1. Claimant is not entitled to permanent partial impairment benefits (PPI).
2. Claimant is not entitled to retraining benefits pursuant to Idaho Code § 72-450.

3. Claimant is not entitled to permanent partial disability benefits (PPD).

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this __9__ day of __June____ 2008.

INDUSTRIAL COMMISSION

_____/s/_____
Susan Veltman, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS KEPPLER,)	
)	
Claimant,)	IC 2004--13592
)	
v.)	
)	
MATHESON FLIGHT)	
EXTENDERS, INC.,)	
)	
Employer,)	
)	ORDER
)	
XL SPECIALTY INSURANCE)	
COMPANY,)	
)	
Surety,)	June 13, 2008
)	
Defendants.)	
)	

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant is not entitled to permanent partial impairment benefits (PPI).
2. Claimant is not entitled to retraining benefits pursuant to Idaho Code § 72-450.
3. Claimant is not entitled to permanent partial disability benefits (PPD).

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __13__ day of __June_____, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R. D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __13__ day of __June_____, 2008, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

HAROLD B SMITH
P O BOX 2083
COEUR D ALENE ID 83816

W SCOTT WIGLE
P O BOX 1007
BOISE ID 83701

jkc

_____/s/_____